

FILED VIA ECFS

July 27, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands* – WT Docket No. 03-66 –
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

Over the past several weeks, the Commission has been subjected to filings in this and other proceedings from The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (“IMWED”).¹ These filings all have a common, but very transparent, purpose – to advance IMWED’s oft-repeated and oft-rejected efforts to radically revise the Commission’s rules regarding the leasing of Educational Broadband Service (“EBS”) spectrum in a manner that pointedly advances IMWED’s financial interests. Because the Wireless Communications Association International, Inc. (“WCA”) already has responded fully to the substantive arguments advanced by IMWED in the past, it has refrained from burdening the Commission with additional responsive filings.² However, IMWED’s latest submission – its “Petition for Extraordinary Relief” – is so offensive that it calls out for a separate response.

¹ See Supplement to Petition of The ITFS/2.5 Mobile Wireless Engineering & Development Alliance, Inc. for Reconsideration, WT Docket No. 03-66 (filed June 20, 2005); Comments of The ITFS/2.5 Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 05-63 (filed July 11, 2005) [“IMWED Comments”]; Petition of The ITFS/2.5 Mobile Wireless Engineering & Development Alliance, Inc. for Extraordinary Relief, WT Docket No. 03-66 (filed July 14, 2005) [“IMWED Petition”].

² See Consolidated Opposition of the Wireless Communications Ass’n Int’l, Inc. to Petitions for Reconsideration, WT Docket No. 03-66, at 35-45 (filed Feb. 22, 2005) [“WCA Opposition”].

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In its Petition for Extraordinary Relief, IMWED calls for the Commission to mandate that all EBS excess capacity leases entered into between January 11, 2005 and July 11, 2005 be filed with the Commission without redaction of competitively-sensitive information and also be made available for public inspection. IMWED bases its petition on the contention that the terms of one lease, filed almost eight months ago by Clarendon Foundation (“Clarendon”), a long-time EBS licensee, in connection with its acquisition of EBS station WAU27 (Milwaukee, WI), justify the radical step of requiring the submission and public inspection of all EBS leases.³

The question of whether EBS excess capacity leases should be filed with the Commission has been argued *ad infinitum* in this proceeding. Indeed, in the *Notice of Proposed Rulemaking*, the Commission itself proposed to relieve EBS licensees of the burden of filing excess capacity lease agreements with the Commission, so long as they retain copies in their files and make them available to the Commission upon request.⁴ That proposal drew substantial support from both legitimate EBS licensees and the commercial lessee community.⁵ Indeed, the only naysayer was IMWED, which urged the Commission to require the filing of excess capacity agreements and demanded a ban on the Commission-sanctioned practice of redacting confidential information irrelevant to whether the lease comports with the Commission’s rules.⁶ However, IMWED provided no meaningful explanation as to why every lease, much less the commercially sensitive information regarding leasing fees and other matters contained within the lease, should be made available to the public. That was hardly surprising, given that the Commission has permitted the redaction of commercially-sensitive information from filed Instructional Television Fixed Service leases for the past twenty years without any adverse consequences. Nor was it surprising when the *Report and Order* rejected IMWED’s proposal and instead amended the general spectrum leasing rules adopted in the *Secondary Markets* proceeding to apply to EBS excess capacity leases, thereby eliminating the requirement that EBS excess leases be filed as a matter

³ Significantly, IMWED did not oppose the assignment of the license of WAU27 to Clarendon. The application for consent to that assignment was filed on January 7, 2005, appeared on public notice as accepted for filing on January 26, 2005, was granted on March 3, 2005, appeared on public notice as granted on March 9, 2005 and on April 13, 2005 the parties filed a notice that the assignment had been consummated.

⁴ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722, 6771-22 (2003).

⁵ See Comments of Wireless Communications Ass’n Int’l, Inc., *et al.*, WT Docket No. 03-66, at 132, (filed Sept. 8, 2003) [“Coalition NPRM Comments”]; Comments of Catholic Television Network and National ITFS Ass’n, WT Docket No. 03-66, at 16 (filed Sept. 8, 2003).

⁶ See Comments of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66, at 10 (filed Sept. 8, 2003).

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of course.⁷ However, EBS licensees are required to submit their leases to the Commission upon request.⁸

It is no accident that the rules adopted in the *Secondary Markets* proceeding do not require either the submission of leases or the public disclosure of competitively-sensitive lease terms, so long as the lease is available for inspection by the Commission upon request.⁹ In adopting those rules, the Commission concluded “[w]e are streamlining the submission form to minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee.”¹⁰ Moreover, the Commission recognized that the submission of unredacted leases is dangerous because they “may involve data (e.g., areas of available spectrum) that could disclose a company’s business plans or sensitive information to its competitors.”¹¹

On reconsideration, IMWED again urged the Commission to adopt a rule that would require all leases of EBS excess capacity to be filed with the Commission without the redaction of commercially sensitive information.¹² Yet, IMWED presented no compelling argument for

⁷ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14232-34 (2004) [“*Report and Order*”].

⁸ See 47 C.F.R. §1.9030(b)(3) (“The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.”).

⁹ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20659 (2003) (“While we will not usually require the lease parties to file a copy of the lease agreement with the notification, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection upon request by the Commission or its representatives.”). Given that the Commission has permitted the redaction of commercially-sensitive information from filed EBS leases for the past twenty years without any adverse consequences, WCA is at a loss to understand how the public would benefit from IMWED’s proposal. IMWED’s petition does not even attempt to advance a substantive argument in support of its position.

¹⁰ *Id.* at 20669. As the Commission noted, “[w]hile we will not routinely require the lease applicants to submit a copy of the lease agreement with the application, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection by the Commission or its representatives.” *Id.* at 20659. See also *id.* at 20660.

¹¹ *Id.* at 20682.

¹² See *Petition of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. for Reconsideration*, WT Docket No. 03-66, at 10-11 (filed Jan. 10, 2005) [“IMWED Report and Order Petition”].

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reconsideration and, once again, IMWED's proposal met with substantial opposition.¹³ Indeed, IMWED's call for all EBS excess capacity leases to be made available to the public without redaction of commercial sensitive terms has been characterized by several diverse parties as "merely a ploy by an EBS licensee which holds licenses in multiple markets to gain access to the financial leasing terms of other EBS licensees for its own negotiating purposes."¹⁴

Perhaps recognizing that it has heretofore presented absolutely no rationale for the Commission to adopt a different approach regarding the filing of EBS excess capacity leases on reconsideration, IMWED's most recent filing frenzy attempts to make a mountain out of the proverbial molehill. That molehill, of course, is the excess capacity lease agreement between Clarendon and PCTV Gold, Inc., a subsidiary of Sprint Corporation ("Sprint"). Although leases need not be filed under the spectrum leasing rules that went into effect on January 10, 2005, the Clarendon/Sprint lease was submitted in connection with the application by Clarendon and the Milwaukee Regional Medical Instructional TV Station, Inc. ("Milwaukee Regional") to assign the license for WAU27 from Milwaukee Regional to Clarendon. What is remarkable here is that, for all of IMWED's empty rhetoric, *Clarendon's excess capacity lease inarguably complies with all of the applicable Commission rules.*

For example, IMWED complains that the agreement between Clarendon and Sprint "specifies that Clarendon's educational use of WAU27's capacity will be the minimum allowed under current Commission Rules."¹⁵ True enough, but so what? *IMWED concedes that Clarendon leased an amount of capacity that comports with Section 27.1214(b) of the Commission's Rules.* The fact that Clarendon (and presumably other EBS licensees) are leasing to commercial operators the maximum capacity permitted under Section 27.1214(b) hardly suggests that the Commission should mandate the filing and public inspection of unredacted leases. To the contrary, it suggests that EBS licensees are capable of fulfilling their educational missions within the capacity sharing framework established by the

¹³ See WCA Opposition at 36 (*citing Report and Order*, 19 FCC Rcd at 14232-34); See also Consolidated Opposition of Sprint Corporation to Petitions for Reconsideration, WT Docket No. 03-66, at 2 (filed Feb. 22, 2005) ["Sprint Opposition"]; See also Consolidated Opposition of Nextel Communications to Petitions for Reconsideration, WT Docket No. 03-66, at 14-19 (filed Feb. 22, 2005) ["Nextel Opposition"].

¹⁴ Consolidated Opposition of C&W Enterprises, Inc. to Petitions for Reconsideration, WT Docket No. 03-66, at 4 (filed Feb. 22, 2005) ["C&W Opposition"]; Consolidated Opposition of Wireless Direct Broadcast System to Petitions for Reconsideration, WT Docket No. 03-66, at 4 (filed Feb. 22, 2005) ["WDBS Opposition"]; Consolidated Opposition of SpeedNet L.L.C. to Petitions for Reconsideration, WT Docket No. 03-66, at 4 (filed Feb. 22, 2005) ["SpeedNet Opposition"]; Opposition of Digital Broadcast Corporation to Petition for Reconsideration, WT Docket No. 03-66, at 3 (filed Feb. 22, 2005) ["DBC Opposition"]. See also Nextel Opposition at 24-25; Sprint Opposition at 4-5; Opposition of Clearwire Corp. to Petitions for Reconsideration, WT Docket No. 03-66, at 2 n.2 (filed Feb. 22, 2005) ["Clearwire Opposition"]; Consolidated Opposition of Luxon Wireless Inc. to Petitions for Reconsideration, WT Docket No. 03-66, at 6 (filed Feb. 22, 2005) ["Luxon Opposition"]; Consolidated Opposition of BellSouth *et al.* to Petitions for Reconsideration, WT Docket No. 03-66, at 13 (filed Feb. 22, 2005) ["BellSouth Opposition"].

¹⁵ IMWED Comments at 4 (citation omitted).

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Commission, while at the same time promoting efficient use of the spectrum through leasing to commercial operations. If anything, this reaffirms WCA's view that the Commission can and should reject IMWED's incessant, some might say tiresome, efforts to reduce the amount of spectrum that an EBS licensee can lease.¹⁶

Similarly, IMWED complains that the lease "appears to conflict with Commission substantive use policy in another respect, as it allows Clarendon to purchase transmission equipment only if the lease is terminated as a result of action by Sprint (as opposed to simple expiration, termination as a result of regulatory action, or termination due to any number of other causes.)"¹⁷ It is correct that under Section 8(b) of the agreement, Clarendon is only entitled to acquire the network equipment at issue if the agreement is terminated by Sprint.¹⁸ However, what IMWED conveniently ignores is that under the applicable Commission rule, Section 27.1214(c):

All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease EBS equipment in the event that the spectrum leasing arrangement is terminated as a result of action by the spectrum lessee.¹⁹

Thus, rather clearly, the Clarendon lease with Sprint fully comports with the rule! While the National ITFS Association ("NIA") and the Catholic Television Network ("CTN") have asked the Commission on reconsideration to restore a prior rule that mandated all EBS leases include a provision affording EBS licensees purchase rights in situations other than lessee terminations, it is difficult to envision what possible public policy is advanced by requiring all EBS excess capacity leases to include this provision.²⁰ As WCA has previously noted:

¹⁶ The Commission's rules establishing the required minimum educational usage of EBS spectrum were adopted in 1998 after great debate, were affirmed on reconsideration in 1999, and were then again re-affirmed by the *Report and Order* in this proceeding. IMWED has been critical of the current rules, but it is significant that not one participant in this proceeding has supported IMWED's repeated call for a five-fold increase in the minimum EBS educational reservation, and it has drawn significant opposition. See WCA Opposition at 37-41; Clearwire Opposition at 2 n.2; Nextel Opposition at 26; Sprint Opposition at 7-9; BellSouth Opposition at 8-9; Coalition NPRM Comments at 128-31.

¹⁷ IMWED Petition at 4.

¹⁸ For some unknown reason, IMWED has cited to Section 12(b) of the agreement, which is not applicable to this issue. See *id.*

¹⁹ 47 C.F.R. § 27.1214(c).

²⁰ See Petition of Catholic Television Network and National ITFS Ass'n for Reconsideration, WT Docket No. 03-66, at 20 (filed Jan. 10, 2005).

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NIA and CTN do not even attempt to explain why the Commission must step in and mandate such a contractual provision. The mandatory contractual provision NIA and CTN seek to restore is and has always been a silly one – why does the lessor need the right to buy comparable equipment at fair market value upon completion of a lease when the lessor is perfectly able to purchase the same equipment at the same price in the open marketplace if it so chooses? How does making this provision mandatory benefit the EBS licensee, or the public? NIA and CTN offer no clue.²¹

More importantly, the policy issue has been fully joined by the NIA/CTN petition and subsequent filings (including WCA's), and IMWED has provided no explanation of why the Commission needs to be monitoring EBS leases and subjecting competitively-sensitive information to public review to decide the issue.

IMWED also takes issue with Clarendon's agreement to assign the license to Sprint *if* the Commission modifies its rules to permit Sprint to hold an EBS licensee and *if* the Commission consents to the assignment.²² Of course, IMWED knows full well that this sort of agreement comports with the Commission's rules, as IMWED's petition for reconsideration of the *Report and Order* seeks to have the rules changed to bar such options.²³ The record clearly establishes that IMWED's position on the merits is wrong, and those arguments need not be repeated in full here.²⁴ For present purposes, WCA merely notes that the fact that Clarendon has agreed to such

²¹ WCA Opposition at 32.

²² See IMWED Comments at 4.

²³ See IMWED Report and Order Petition at 9-10.

²⁴ Suffice it to say that IMWED's proposal drew universal scorn from those commenting. See WCA Opposition at 41-43; C&W Opposition at 3; WDBS Opposition at 3; SpeedNet Opposition at 3; DBC Opposition at 2; Sprint Opposition at 3-4; Nextel Opposition at 25; Clearwire Opposition at 2 n.2; Luxon Opposition at 5; BellSouth Opposition at 10. As WCA noted:

IMWED is certainly right that the *Report and Order* maintained the current EBS eligibility restriction and that commercial system operators are generally not eligible at the present time to hold EBS authorizations. However, it is certainly possible that within the foreseeable future the Commission will either reconsider its policy on EBS eligibility or grant a waiver due to the exigencies of a particular circumstance. By granting a purchase option to a lessee, a spectrum lessor can provide that lessee with a greater degree of certainty concerning its ability to develop the spectrum to its highest and best use. And that, in turn, will result in greater financial support for the lessor.

Purchase options are generally recognized by the Commission as benign vehicles that do not raise eligibility concerns until they are exercised. For all its rhetoric, IMWED has failed to present one substantive argument that the Commission's objectives for the 2.5 GHz band are somehow being undermined by allowing EBS licensees to receive financial or other consideration in exchange for a purchase option that may or may not be exercisable in the future.

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a provision (presumably in exchange for consideration that will advance its educational objectives) hardly suggests the Commission needs to require the immediate filing and public inspection of all EBS leases. IMWED has put the policy question before the Commission on reconsideration, and subjecting all EBS excess capacity leases (including trade sensitive provisions) to public inspection will not assist the Commission in making a reasoned decision on the merits.

The same can be said of IMWED's complaint that the Clarendon lease runs the maximum length permitted by the Commission.²⁵ Section 2 of the agreement clearly reflects an appreciation that while the Commission's current rules do not impose any limit on the length of an EBS lease, IMWED and others have sought the imposition of a fifteen year term limit. How can there possibly be anything wrong with a lease that extends no longer than the maximum period permitted by the Commission? WCA is on record as supporting the *Report and Order's* elimination of any maximum lease term.²⁶ But, more importantly for present purposes, IMWED already has put the policy question before the Commission on reconsideration, and the Commission does not need to subject all EBS excess capacity leases to public inspection to make a reasoned decision on the merits of that issue.

In short, there is no reason for the Commission to grant IMWED's Petition for Emergency Relief and force EBS licensees to file and subject to public inspection all EBS leases. The Commission has full authority to require the filing of specific agreements when it has reason to believe its rules have been violated. To the extent that policy issues involving EBS excess capacity leasing are pending before the Commission on reconsideration of the *Report and Order* in this proceeding, IMWED establishes no reason for the Commission to review individual leases to resolve those policy issues.

Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the

WCA Opposition at 42-43 (footnotes omitted).

²⁵ See IMWED Petition at 3.

²⁶ See WCA Opposition at 33-34 ("Rather obviously, investment in the 2.5 GHz band is going to be deterred by Commission policies that limit EBS lease terms and thus limit the period over which system operators and their investors can depend upon receiving a return on investment. WCA is not suggesting that the Commission force EBS licensees to enter into leases extending more than fifteen years. To the contrary, WCA believes that every EBS licensee should be free to craft its excess capacity lease in the manner that best suits its own needs. In some cases, that might result in short-term leases and in some cases it might result in a lease extending beyond fifteen years (for which the EBS licensee is likely to receive a more substantial package of direct financial compensation, equipment and/or services in recognition of the greater benefit the lessee realizes by virtue of the long-term certainty provided). The EBS licensee should decide what best meets local educational needs, not the Commission.").

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above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand

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